PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Name NAVARRO (Last) MANUEL (First) M. (Initial)

Prisoner Number P-94139

Institutional Address P.O. BOX 705, SOLEDAD, CALIF. 93960

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MANUEL M. NAVARRO
(Enter the full name of plaintiff in this action.)

vs.

BEN CURRY, WARDEN

(Enter the full name of respondent(s) or jailor in this action)

Case No. _____
(To be provided by the clerk of court)

PETITION FOR A WRIT OF HABEAS CORPUS

Read Comments Carefully Before Filling In

When and Where to File

You should file in the Northern District if you were convicted and sentenced in one of these counties: Alameda, Contra Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Monterey, Napa, San Benito, Santa Clara, Santa Cruz, San Francisco, San Mateo and Sonoma. You should also file in this district if you are challenging the manner in which your sentence is being executed, such as loss of good time credits, and you are confined in one of these counties. Habeas L.R. 2254-3(a).

If you are challenging your conviction or sentence and you were not convicted and sentenced in one of the above-named fifteen counties, your petition will likely be transferred to the United States District Court for the district in which the state court that convicted and sentenced you is located. If you are challenging the execution of your sentence and you are not in prison in one of these counties, your petition will likely be transferred to the district court for the district that includes the institution where you are confined. Habeas L.R. 2254-3(b).

Who to Name as Respondent

You must name the person in whose actual custody you are. This usually means the Warden or jailor. Do not name the State of California, a city, a county or the superior court of the county in which you are imprisoned or by whom you were convicted and sentenced. These are not proper respondents.

If you are not presently in custody pursuant to the state judgment against which you seek relief but may be subject to such custody in the future (e.g., detainers), you must name the person in whose custody you are now and the Attorney General of the state in which the judgment you seek to attack was entered.

A. INFORMATION ABOUT YOUR CONVICTION AND SENTENCE

1. What sentence are you challenging in this petition?

(a) Name and location of court that imposed sentence (for example; Alameda County Superior Court, Oakland):

ALAMEDA COUNTY SUP. CT. HAYWARD

Court Location

(b) Case number, if known H31293

(c) Date and terms of sentence JULY 10, 2003/10YEARS

(d) Are you now in custody serving this term? (Custody means being in jail, on parole or probation, etc.) Yes XX No ____

Where?

Name of Institution: CORRECTIONAL TRAINING FACILITY

Address: P.O. BOX 705, SOLEDAD, CA. 93960-0705

2. For what crime were you given this sentence? (If your petition challenges a sentence for more than one crime, list each crime separately using Penal Code numbers if known. If you are challenging more than one sentence, you should file a different petition for each sentence.)

451 (b)/451.1 (a)/667.5 (b)

3. Did you have any of the following?

Arraignment: Yes XX No ____

Preliminary Hearing: Yes XX No ____

Motion to Suppress: Yes ____ No XX

4. How did you plead?

Guilty ____ Not Guilty XX Nolo Contendere ____

Any other plea (specify) NO

5. If you went to trial, what kind of trial did you have?

Jury XX Judge alone ____ Judge alone on a transcript ____

6. Did you testify at your trial? Yes ____ No XX

7. Did you have an attorney at the following proceedings:

(a) Arraignment Yes XX No ____

(b) Preliminary hearing Yes XX No ____

(c) Time of plea Yes XX No ____

(d) Trial Yes XX No ____

(e) Sentencing Yes XX No ____

(f) Appeal Yes XX No ____

(g) Other post-conviction proceeding Yes ____ No XX

8. Did you appeal your conviction? Yes XX No ____

(a) If you did, to what court(s) did you appeal?

Court of Appeal Yes XX No ____

Year: 2003 Result: JUDGEMENT AFFIRMED

Supreme Court of California Yes XX No ____

Year: 2004 Result: REVIEW DENIED

Any other court Yes ____ No XX

Year: ____ Result: I/A

(b) If you appealed, were the grounds the same as those that you are raising in this

petition? Yes ____ No XX

(c) Was there an opinion? Yes XX No ____

(d) Did you seek permission to file a late appeal under Rule 31(a)?

Yes ____ No XX (N/A)

If you did, give the name of the court and the result:

9. Other than appeals, have you previously filed any petitions, applications or motions with respect to this conviction in any court, state or federal? Yes XX No ____

[Note: If you previously filed a petition for a writ of habeas corpus in federal court that challenged the same conviction you are challenging now and if that petition was denied or dismissed with prejudice, you must first file a motion in the United States Court of Appeals for the Ninth Circuit for an order authorizing the district court to consider this petition. You may not file a second or subsequent federal habeas petition without first obtaining such an order from the Ninth Circuit. 28 U.S.C. §§ 2244(b).]

(a) If you sought relief in any proceeding other than an appeal, answer the following questions for each proceeding. Attach extra paper if you need more space.

I. Name of Court: ALAMEDA COUNTY SUPERIOR COURT

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific):

a. SAME AS THOSE RAISED IN THIS PETITION

b.

c.

d.

Result: DENIED Date of Result: U/A

II. Name of Court: CALIF. CT. OF APPEAL FIRST APP. DIST.

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific):

SAME AS PREVIOUS PETITIONS

a. _____

b. _____

c. _____

d. _____

Result: DENIED Date of Result: U?A

III. Name of Court: CALIF. SUPREME COURT

Type of Proceeding: HABEAS CORPUS

Grounds raised (Be brief but specific):

a. SAME AS PREVIOUS PETITIONS

b. _____

c. _____

d. _____

Result: DENIED Date of Result: U/A

IV. Name of Court: N/A

Type of Proceeding: _____

Grounds raised (Be brief but specific):

a. _____

b. _____

c. _____

d. _____

Result: N/A Date of Result: N/A

(b) Is any petition, appeal or other post-conviction proceeding now pending in any court?

Yes ____ No XX

Name and location of court: N/A

B. GROUNDS FOR RELIEF

State briefly every reason that you believe you are being confined unlawfully. Give facts to support each claim. For example, what legal right or privilege were you denied? What happened? Who made the error? Avoid legal arguments with numerous case citations. Attach extra paper if you

need more space. Answer the same questions for each claim.

[Note: You must present ALL your claims in your first federal habeas petition. Subsequent petitions may be dismissed without review on the merits. 28 U.S.C. §§ 2244(b); McCleskey v. Zant, 499 U.S. 467, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).]

Claim One: PLEASE SEE ATTACHED PETITION

Supporting Facts: PLEASE SEE ATTACHED PETITION

Claim Two: PLEASE SEE ATTACHED PETITION

Supporting Facts: PLEASE SEE ATTACHED PETITION

Claim Three: PLEASE SEE ATTACHED PETITION

Supporting Facts: PLEASE SEE ATTACHED PETITION

If any of these grounds was not previously presented to any other court, state briefly which grounds were not presented and why:

N/A

List, by name and citation only, any cases that you think are close factually to yours so that they are an example of the error you believe occurred in your case. Do not discuss the holding or reasoning of these cases:

PLEASE SEE ATTACHED PETITION

Do you have an attorney for this petition? Yes____ No XX

If you do, give the name and address of your attorney:

WHEREFORE, petitioner prays that the Court grant petitioner relief to which s/he may be entitled in this proceeding. I verify under penalty of perjury that the foregoing is true and correct.

Executed on 2/15/08 Manuel M. Navarro

Date Signature of Petitioner

(Rev. 6/02)

MANUEL M. NAVARRO
CDCR #P-94139 TD-6L
C.T.F. NORTH FACILITY
P.O. BOX 705
SOLEDAD, CALIF. 93960-0705

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MANUEL M. NAVARRO, Petitioner, -vs- **BEN CURRY, WARDEN,** Respondent.	Case No._____ **PETITION FOR WRIT OF HABEAS CORPUS 28 U.S.C. § 2254**

COMES NOW, petitioner, **Manuel M. Navarro**, pursuant to **28 U.S.C. § 2254**, and all other relevant and applicable (federal) habeas corpus rules, and hereby respectfully prays for the above entitled court to issue forth immediately, a writ of habeas corpus, thereby ordering the immediate and unconditional release of petitioner therefrom further unconstitutional restraint of his liberty of which such unconstitutional restraint was caused by various violations of petitioner's substantial rights to which petitioner further states as follows:

I. STANDARD OF REVIEW

Citing **28 U.S.C. § 2254 (a)** and the relevant portion thereof: ["]The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgement of a State Court only on the ground that he is in custody in violation of the [U.S.] Constitution or laws or treaties of the United States.

Pursuant to **§ 2254 (b)(1)**, an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgement of a state court shall not be granted unless it appears that: (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available state corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

Federal habeas corpus relief is also not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. **28 U.S.C. § 2254 (d)(1)(2);** **Ramirez v. Castro**, **365 F.3d 755, 773-775 (9th Cir. 2004).** The "contrary to" and "unreasonable application" clauses of **§ 2254 (d)(1)** are different. As the U.S. Supreme Court explained:

> ["]A federal habeas court may issue the writ under the "contrary to" clause if the State Court applies the rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts. The court may grant relief under the

> "unreasonable application clause" if the state court correctly identifies the governing legal principle from our decisions but unreasonably applies it to the facts of the particular case. The focus of the latter inquiry is on whether the State Court's application of clearly established federal law is objectively unreasonable, and we stressed in **Williams v. [Taylor**, 529 U.S. 362 (2000)] that an unreasonable application is different from an incorrect one.

Bell v. Cone, 535 U.S. 685, 694 (2002).

The court will look to the last reasoned state court decision in determining whether the law applied to a particular claim by the state courts was contrary to the law set forth in the cases of the United States Supreme Court or whether an unreasonable application of such law has occurred. **Avila v. Galaza**, 297 F.3d 911, 918 (9th Cir. 2002) **cert. dismissed**, 538 U.S. 919 (2003). Where the state court fails to give any reasoning whatsoever in support of the denial of a claim arising under Constitutional or federal law, the Ninth Circuit has held that [this] court must perform an independent review of the record to ascertain whether the state court decision was objectively unreasonable. **Himes v. Thompson**, 336 F.3d 848, 853 (9th Cir. 2003).

Finally, it is the habeas petitioner's burden to show he is not precluded from obtaining relief by § 2254 (d). See **Woodford v. Visciotti**, 537 U.S. 19, 25 (2002).

II. JURISDICTION

The United States Supreme Court and the lower federal courts have jurisdiction over federal questions presented in state law proceedings. **U.S. Const. Art. VI, cl.2** (supremacy clause.) In state court criminal cases, the Supreme Court

exercises this jurisdiction through its discretion to grant writs of certiorari. (28 U.S.C. § 1254; U.S. Sup. R. 10-16); the lower federal courts have jurisdiction to hear habeas corpus petitions brought by state prisoners. § 2254.

With rarely applicable exceptions, eligibility for federal review of a state court conviction requires the defendant to first seek relief in the state court of last resort--the highest state court in which the defendant is entitled to seek relief. 28 U.S.C. § 1257 (a); U.S. Sup. Ct. R 13.1 (certiorari.); 28 U.S.C. § 2254 (B)(1) (requiring exhaustion of state court remedies by habeas corpus petitioner's.) For defendants convicted of felonies, the court of last resort in the state of California is the California Supreme Court.

Here, in this case, because petitioner has in fact exhausted all available state court remedies so required of him, this court is thus the appropriate court of jurisdiction to hear and entertain this instant petition.

III. EXHAUSTION OF REMEDIES

As noted in Section II supra, petitioner has exhausted the state court remedies as so required of him pursuant to 28 U.S.C. § 2254 (b)(1)(A) in having presented the claims contained herein this instant petition infra to the California Supreme Court which denied relief as noted therein the statement of the case below.

IV. STATEMENT OF THE CASE

By information filed January 22, 2002, petitioner was

charged with arson of an inhabited dwelling (**Penal Code (P.C.) § 451 (b)**)--enhanced by a prior arson conviction (**P.C. § 451.1 (a)**) which also qualified as a prior prison term pursuant to **§ 667.5 (b)**.[1/] CT 64-65, 119-122.[2/] Petitioner pleaded not guilty to the abovesaid charges. CT 67.

Jury trial commenced May 14, 2003, with **in limine** and **bifurcation** motions primarily directed at a prior conviction and evidence surrounding a 1999 arson at the same dwelling. CT 141. The motion was heard and denied. CT 135-139, RT 8-28. Subsequently, the cause was submitted to the jury which returned its verdict finding petitioner guilty as charged. CT 158.

On July 10, 2003, petitioner was sentenced to the mid-term of five years for arson (**§ 451 (b)**), plus the midterm of four years for the prior arson conviction (**§451.1 (a)**), plus one year for the prior prison term (**§ 667.5 (b)**) for a total of ten years in state prison with 583 days local custody credits calculated pursuant to **§ 2933.1**. RT 160, 162-163. Petitioner filed a timely notice of appeal.[3/]

1/. All statutory references are to the Penal Code unless otherwise noted.

2/. "CT" stands for Clerks Transcripts on Appeal; "RT" stands for Reporters Transcripts on Appeal.

3/. Due to extraordinary circumstances beyond petitioner's control as duly explained therein his verified declaration attached hereto infra, petitioner does not possess the opinions or dates of the opinions of either of the state courts with regards to his direct appeal and habeas corpus actions of which were litigated on his behalf. Petitioner however, avers that such opinions exist and the dates thereof will show his having satisfied the exhaustion requirement.

V. STATEMENT OF FACTS

On August 1, 2001, at 2:45 p.m., Sargent Cory Quinn of the Hayward Police Department was dispatched to 26791 Peterman Avenue where smoke was seen rising from the roof. RT 89. Upon Quinn's arrival, the fire department was already at work with a ladder up to the roof. RT 90-91. Quinn climbed to the roof where he saw smoke rising from holes that the fire department had cut to vent the smoke. RT 90. An attic crawl space was visible immediately below the holes cut into the roof.

Quinn looked through one such hole and saw "the defendant [petitioner] sitting there with his legs crossed....with a ring of fire around him." RT 91: 18-21. Petitioner was six feet away (RT 101) and the fire was a "semi-circle of about 36 inches." RT 101: 6-9. According to Quinn, petitioner "almost definitely" looked at Quinn, but ignored commands to climb out. RT 93: 2-4. Quinn stated that he directed petitioner out of the attic, but petitioner "basically, flipped me off." RT 93, 14-18. At the time, petitioner did not have anything in his hands. RT 101-102.

Quinn next, grabbed a fire hose and doused the circle of flame. RT 94. The fire was out in "[l]ess than 10 seconds." RT 103. With the flames out, Quinn again ordered petitioner down from the roof, to no avail. RT 94. At that point Quinn "dispensed" his pepper spray (RT 94), but achieved no better result. RT 95. A second dose of pepper spray elicited a scream, and petitioner started scrambling on all

fours toward Quinn. RT 95. When petitioner came out of the crawl space onto the roof he was grabbed by Quinn. RT 96. The subsequent struggle drew assistance from other personnel on the roof until petitioner was subdued. RT 97.

Petitioner was handcuffed and restrained on a gurney, then lowered from the roof. RT 97-98. Petitioner was in a state of agitation all the way down. RT 98.[4/]

Petitioner was treated for burns at St. Rose Hospital. RT 106-107. He had suffered substantial burns. RT 132 [medical records]. A "BIC" brand cigarette lighter and $134 cash was recovered from his person at the hospital. RT 107, 109.

Inspection of the crawl space fire revealed one point of origin (RT 115: 11-14, 120: 26-28), a 2 x 4" ceiling joist over the garage, the same area petitioner was located. RT 122. Also in the area of the point of origin was some electrical, "Romex" wiring stapled (plastic fasteners with metal pins) near the point of origin. RT 117: 9-15. Fire Inspector Barry Reed, who was qualified as an expert "as to causes and origins of fire" (RT 112), inspected the wiring and opined that the Romex would probably have turned a "reddish color" if it had been the cause of the fire. RT 118-119. Reed also rendered an expert opinion that the "fire started without some type of direct flame contact."

4/. Petitioner's son, Justin, testified that petitioner was handcuffed in a hogtied position" and yelling "Help, help me" on the way down. RT 171.

RT 120: 22-25. Reed opined that the fire could be started with a BIC lighter, and that it would take from one to three minutes to start. RT 121.

Petitioner's son, Justin, who was 15 years old at the time of trial, testified that petitioner lived in the crawl space over the garage. RT 47-48, 56. The space was accessible through a hole in the wall left by electrical repairmen from an earlier fire. RT 60, 66. On the date of the fire, Justin went to the garage to fetch petitioner for dinner, and petitioner said he would be down in a bit. RT 57. At the time of this exchange, petitioner did not appear unusual to Justin. RT 58.

Subsequently, Justin noticed the ceiling fan shake and almost fall down. RT 59. Justin and his sister moved under the skylight to avoid falling debris, and heard footsteps and a yell come from the attic. RT 59-60. Justin went outside where he was able to see smoke coming from vents on the side of the house. RT 61. He saw the smoke within a minute or two after calling for petitioner to come down and eat. RT 62.

At trial, evidence of petitioner's prior conviction for recklessly causing a fire was introduced by judicial notice of the court file. RT 130 [Alameda County No. H27277931. Additional evidence regarding the facts surrounding petitioner's "no contest" plea in that case was elicited from testimony by the fire marshal who inspected the first fire, and from justin.

During the summer of 1999, Justin was living at his grandmother's at the Peterman address. RT 49. On August 16, 1999, he returned from his other grandmother's (also located in Hayward) to find petitioner standing in the living room holding a propane tank and plastic red gas can of which the tank was emitting flame. RT 51-52. The living room couch had a "little flame" on it which petitioner put out using the gas can. RT 52. Justin left the house without saying anything to petitioner. RT 52.

On his way back to his other grandmother's, Justin noticed fire trucks heading to the Peterman address. RT 54. He returned to watch the fire trucks. RT 54. The prosecution asked Justin: "Did his father ever tell him he didn't start that first fire?" Justin replied "No." RT-19-20.

Inspection of the premises after the fire revealed several places of origin, including a shed 50 feet from the main residence. RT 77-84. Robert Arteaga, the fire Marshal who inspected the August 1999 fire was qualified as an expert and rendered an opinion that multiple places of origin were "unlikely to happen for the average fire." RT 78. It appeared to Arteaga that an accelerant had been used because the fireman who put out the flames said the fire was proned to spontaneously re-igniting. RT 81. Arteaga testified that the couch in the living room burned within fifteen minutes of the last person leaving the house. RT 86.

Petitioner's mother testified on his behalf at trial. RT 132. She testified that petitioner was despondent over

a failed marriage and often talked to himself in the crawl space over the garage. RT 132-135. Mrs. Navarro also testified that the crawl space where petitioner was staying was unfinished. Electrical repairs after the first fire took some time because of insurance problems, and the first electrical contractors had to be replaced. RT 136-137.

On October 1, 2001, just prior to the time of the fire, everything seemed normal as Mrs. Navarro heard petitioner ask his son Justin "what is for lunch.?" RT 137. Shortly afterward, Justin alerted her that smoke was coming out of the roof vents. RT 138. Mrs. Navarro ran outside the house and dialed '911.' RT 138. When she ran back into the house she saw petitioner climbed through the access hole into the attic. RT 138: 6-9, 139.

Mrs. Navarro went back outside where she was assisted by a neighbor. RT 138. She watched her son removed from the roof "wet, burned" and perhaps "unconscious." RT 139.

VI. GROUNDS FOR RELIEF

Petitioner avers that he is unlawfully restrained of his liberty by the California Department of Corrections and Rehabilitation (CDCR), specifically at the Correctional Training Facility (CTF), located in Soledad, California, where Ben Curry is Warden therein, pursuant to a conviction(s) and sentence(s) of which he suffered in the Alameda County Superior Court under Case No. H31293. Petitioner conjunctly avers that such conviction(s)/sentence(s) should be set aside in habeas corpus for the following reasons/grounds:

I. PETITIONER'S CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE INFRINGED WHEN HIS INITIAL ARRAIGNMENT FOR THE CRIMES OF WHICH HE CURRENTLY STANDS CONVICTED WAS UNREASONABLY DELAYED THEREBY RENDERING THE STATE COURT'S REJECTION OF SUCH CLAIM OBJECTIVELY UNREASONABLE.

II. PETITIONER'S CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE INFRINGED WHEN A PRELIMINARY HEARING WAS NOT CONDUCTED WITHIN 10 DAYS OF HIS INITIAL ARRAIGNMENT THEREBY RENDERING THE STATE COURT'S REJECTION OF SUCH CLAIM OBJECTIVELY UNREASONABLE.

III. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO ENSURE THAT PETITIONER'S SPEEDY TRIAL RIGHTS WERE SAFE-GUARDED WITH REGARDS TO ARRAIGNMENT AND PRELIMINARY HEARING PROCEEDINGS.

IV. PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING AS TO THE CLAIMS PRESENTED HEREIN THIS INSTANT HABEAS CORPUS PETITION.

VII. NO OTHER REMEDY AT LAW

Petitioner has no other plain, speedy, or adquate remedy in the ordinary course of the law to have entertained and heard, the claims contained herein this instant petition.

VIII. PRAYER FOR RELIEF

WHEREFORE, petitioner prays for relief as follows:

1. For a writ of habeas corpus to issue directing the Director of the CDCR and petitioner's immediate custodian, to wit, Ben Curry, Warden at CTF, to bring petitioner before the appropriate court of jurisdiction to show then why the conviction(s) of which petitioner currently suffers should not be reversed.

2. For any other relief deemed appropriate and just by this court to be granted just the same, including, but not limited to, this court conducting an evidentiary hearing so as to resolve all mixed questions of law and fact and

any other issues that may need resolving via such a hearing.

Executed on this 15 day of February, 2008.

By: Manuel M. Navarro

Manuel M. Navarro
CDCR #P-94139 TD-6L
C.T.F. North Facility
P.O. Box 705
Soledad, Calif. 93960-0705

MANUEL M. NAVARRO
CDCR #P-94139 TD-6L
C.T.F. NORTH FACILITY
P.O. BOX 705
SOLEDAD, CALIF. 93960-0705

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MANUEL M. NAVARRO, Petitioner, -vs- **BEN CURRY, WARDEN,** Respondent.	**Case No.**_____ **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

GROUND I-A.

PETITIONER'S CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE INFRINGED WHEN HIS INITIAL ARRAIGNMENT FOR THE CRIMES OF WHICH HE CURRENTLY STANDS CONVICTED WAS UNREASONABLY DELAYED THEREBY RENDERING THE STATE COURT'S REJECTION OF SUCH CLAIM OBJECTIVELY UNREASONABLE.

Despite petitioner not having in his possession, either of the state court reasoned opinions in this case denying his overall claims contained herein--see petitioner's verified declaration attached hereto infra as Exhibit (Exh.) A--he nonetheless avers that such decisions by the state court(s), as discussed more fully below, were based on an unreasonable application of clearly established federal law.

I-B. Petitioner Enjoyed A Constitutional Right To Be Arraigned Within 48 Hours Of His Arrest.

Save for extraordinary circumstances explained more fully post, petitioner, at the time of his arrest in this

case, enjoyed a constitutional right under both, state and federal standards to be arraigned within 48 hours of his arrest.

Under federal constitutional standards, the U.S. Supreme Court in **Gerstein v. Pugh, 420 U.S. 103 (1975)**, held that the Fourth Amendment's shield against unreasonable seizures requires a prompt judicial determination of probable cause following an arrest made without a warrant and ensuing detention.

Clarifying the "prompt" clause noted in **Gerstein** in a later decision as that of **County of Riverside v. McLaughlin, 500 U.S. 44 (1991)**, the U.S. Supreme Court established that "prompt" generally means within 48 hours of the warrantless arrest; absent extraordinary circumstances, a longer delay violates the Fourth Amendment. Also see **Powell v. Nevada, 511 U.S. 80 (1994)** (the same.)

Similarly, under (California) state standards, **P.C. § 825** requires that an arraignment be held within 48 hours of ["]defendant's" arrest, excluding Sundays and Holidays. See **P.C. § 825 et seq.; People v. Turner, 32 Cal. Rptr.2d 782 (1994)**.

Accordingly, based on the above, petitioner enjoyed a constitutional right to be arraigned within 48 hours of his arrest.

I-C. Petitioner's Arraignment Was Unreasonably Delayed.

["]In evaluating whether the delay [of arraigment] in a particular case is unreasonable...., the courts must allow

a substantial degree of flexibility." **County of Riverside v. McLaughlin**, **supra** at p. **1670.** Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities. **Ibid.** [However], a probable cause determination in a particular case does not pass constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate **Gerstein** if the individual can prove that his or her probable cause determination was unreasonably delayed. **Ibid.**

Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. **County of Riverside v. McLaughlin**, **supra** at p. **1670.**

In this instant case, the record reflects that petitioner was arrested on August 1, 2001, but not arraigned until August 8, 2001--approximately seven (7) days later. Petitioner avers that such delay in arraignment was unreasonable and unsupported by extraordinary circumstances.

For example, despite petitioner having been initially hospitalized on the day of his arrest to undergo minor surgery, there exists no evidence of credible worth to suggest that petitioner's injuries were grave enough to warrant a

delay in arraigning him. Put another way, there exist no evidence to infer that petitioner's health would have been jeopardized by way of arraigning him in a timely manner. Save for the issue of petitioner's hospitalization, there simply is no other conceivable extraordinary circumstance of which the state courts could/can rely upon to justify a 7 day delay in arraigning petitioner.

Finally, but more notably, where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. **County of Riverside v. McLaughlin**, **supra** at p. **1670.** In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bonafide emergency or other extraordinary circumstance. **Ibid.** The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. **Ibid.**

In this case, the record fails to reflect any emergency or viable extraordinary circumstance that would validate the 7 day delay in arraigning petitioner. Being so, any contrary reasoning must fail.

GROUND II-A.

PETITIONER'S CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL WERE INFRINGED WHEN A PRELIMINARY HEARING WAS NOT CONDUCTED WITHIN 10 DAYS OF HIS INITIAL ARRAIGNMENT THEREBY RENDERING THE STATE COURT'S REJECTION OF SUCH CLAIM OBJECTIVELY UNREASONABLE.

Similarly, as with Ground I supra, despite petitioner lacking possession of either of the state court's reasoned opinions in this case, petitioner nonetheless avers that the state court's rejection of the above captioned claim was, as discussed more fully below, based on an unreasonable application of clearly established federal law.

II-B. **Petitioner Possessed A Constitutional Right To A Speedy Trial.**

The Sixth Amendment to the federal constitution, as applied to the states through the due process clause of the Fourteenth Amendment guarantees a criminal defendant the "right to a speedy and public trial." See **Barker v. Wingo, 407 U.S. 514-515 (1972)** (quoting **Klopfer v. North-Carolina, 386 U.S. 213 (1967).**)

Similarly, **Article I-15** of the California Constitution guarantees an accused the "right to a speedy and public trial."

Finally, the Sixth Amendment right to a speedy trial attaches with the filing of the accusatory pleading or the arrest, whichever comes first. **People v. Alvarado, 72 Cal. Rptr.2d 209, 211 (1997)** (quoting **Serna v. Superior Court, 219 Cal. Rptr. 420 (1985).**)

In this case, petitioner unequivocally asserted the abovesaid right. Petitioner's Declaration at Exh. A hereto.

II-C. The Delay In Conducting Petitioner's Preliminary Hearing Was A Prejudicial Infringement Thereupon His Speedy Trial Rights.

To prevail on a Sixth Amendment speedy trial claim, a defendant must demonstrate actual prejudice unless, "'the first three **Barker** factors weighed heavily against the government.....' [Citations.]" **People v. Alvarado**, **supra** at p. 211.

Pursuant to **Barker**, **supra** at pp. 514, 530, the presumptively prejudicial length of delay operates as a "triggering mechanism" which necessitates inquiry into other factors. All of the factors must be balanced in order to determine whether or not there was a violation of [a] defendant's federal rights to a speedy trial. In addition to the length of the delay, the other factors which must be weighed....are: (1) the reason for the delay; (2) the defendant's assertion of his right to a speedy trial; and (3) actual prejudice to the defendant. **Ibid**. The foregoing factors are related and must be considered together with such other circumstances as may be relevant. **Id**. at p. 533.

Particularly with regards to the prejudice factor, the **Barker** Court pointed out that: ["]Prejudice, of course, should be assessed in light of the interests of the defendants which the speedy trial right was designed to protect." **Barker**, **supra** at p. 533. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and

(iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant to adequately prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown. **Ibid**.

Here, in this case, petitioner avers that all of the prejudice factors of which the **Barker** Court outlined were experienced by him. For example, having unequivocally asserted his speedy trial rights, petitioner's interest to prevent oppressive pretrial incarceration was in fact, overpowered by oppressive pretrial incarceration in that credulity need not be strained to realize that the amount of pretrial incarceration of which petitioner endured was manifestly oppressive. Moreover, petitioner's interest in minimizing anxiety and concern was equally overpowered by the very fact of the abovesaid oppressive pretrial incarceration and all of the adverse attributes that were/are conjoined therewith.

Furthermore, petitioner's defense was effectively impaired in that the record evidence in this case--albeit petitioner lacks possession of the bulk of such records (petitioner's verified declaration at Exh. A hereto)--is replete with instances of various (defense) witnesses being

unable to recall accurately, events of the distant past. Even if the record does not show such witness memory loss, such by no means negates petitioner's instant stance. ["]Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown." **Barker**, **supra** at p. **533.**

Given the above, great effort is not required to realize that petitioner suffered prejudice with regards to this instant claim. Being so, any contrary reasoning should be rejected.

GROUND III-A.

PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHEN COUNSEL FAILED TO ENSURE THAT PETITIONER'S SPEEDY TRIAL RIGHTS WERE SAFE-GUARDED WITH REGARDS TO ARRAIGNMENT AND PRELIMINARY HEARING PROCEEDINGS.

The state court's rejection of petitioner's Ineffective Assistance of [Trial] Counsel (IAC) claims, as discussed more fully below, was based on an unreasonable application of clearly establish federal law.

To establish IAC, a convicted defendant must show: (1) that his counsel's performance was deficient and fell below an objective standard of reasonableness under prevailing norms; and (2) that the deficient performance prejudiced the defense, i.e., that there is a reasonable probability that, but for counsel's unprofessional performance, the result of the proceeding would have been different. See **Strickland v. Washington**, **466 U.S. 688 (1984).** Moreover, the Court in **Strickland** explained that counsel's responsibilities incident to ensuring a fair trial include "the overreaching

duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of the important developments of the prosecution."

In this case, trial counsel's performance was both deficient and prejudicial.

For example, incorporating Grounds I and II supra by reference as if rewritten herein, by the very fact that petitioner unequivocally asserted his speedy trial rights placed upon trial counsel, the duty to ensure that such right(s) were secured. Moreover, despite counsel being the "captain of the ship," the record fails to reflect any extraordinary strategic circumstances of which trial counsel could/can rely upon to date, that would justify the disregard for petitioner's asserted speedy trial rights. Being so, it is apparent that counsel's failure to ensure that petitioner's speedy trial rights were secured was deficient performance.

As to prejudice, petitioner has demonstrated cogently and colorably herein ante that the deprivation of his speedy trial rights was prejudicial, hence rendering trial counsel's performance as alleged herein to be prejudicial just the same. As such, any contrary reasoning must fail.

GROUND IV-A.

PETITIONER IS ENTITLED TO AN EVIDENTIARY HEARING AS TO THE CLAIMS PRESENTED HEREIN THIS INSTANT HABEAS CORPUS PETITION.

A federal habeas corpus petitioner is entitled to an

evidentiary hearing where the petitioner establishes a "colorable" claim for relief and where the petitioner has never been accorded a state or federal hearing on his claim[s]. See **Earp v. Oronski**, 431 F.3d 1158, 1167 (9th Cir. 2005) (citing **Townsend v. Sain**, 372 U.S. 293 (1963); **Keeney-v. Tamayo-Reyes**, 504 U.S. 1, 5 (1992).) In showing a colorable claim, a petitioner is "required to allege specific facts, which, if true, would entitle him to relief." **Ortiz v. Stewart**, 149 F.3d 923, 934 (9th Cir. 1988). Moreover, despite the fact that under **AEDPA**, if a petitioner fails to develop in state court the factual basis for a claim, hence being then restricted in his ability to do so in federal court (see **28 U.S.C. § 2254 (e)(2)**), such restriction(s) do not apply if a petitioner exercised due diligence in state court and attempted to develop the factual basis of his claim. As the Supreme Court has explained, "a failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." **Williams v. Taylor**, 529 U.S. 420, 432 (2000). The [High] Court further noted that "[d]iligence will require in the usual case, that the prisoner, at minimum, seek an evidentiary hearing in state court in the manner prescribed by law." **Id.** at p. 437. Additionally, to be clear, the court in **Townsend**, at p. 313, established that a defendant is entitled to an evidentiary hearing if he can show that:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state

> factual determination is not fairly supported by the record as a whole; (3) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing. **Ibid**.

If the defendant can establish either of the abovesaid circumstances, then the state court's decision was based on an unreasonable determination of the facts and the habeas (federal) court can independently review the merits of that decision by conducting an evidentiary hearing. See **Taylor v. Maddox, 366 F.3d 992, 1001 (9th Cir. 2004)** ("if, for example, a state court makes evidentiary findings without holding a hearing giving the petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts.")

In this case, incorporating Grounds I-III supra by reference as if rewritten herein, petitioner has clearly set forth colorable claims for relief, i.e., allegations of specific fact, which if true, would entitle him to relief. Moreover, petitioner has done all within the ambit of his power to develop the factual basis for his claims. Particularly, petitioner has proffered the state court(s) the factual basis for both, his IAC claims and his claims of speedy trial error. Petitioner likwise, avers that due to the latter, it was incumbent upon the state court(s) to conduct an evidentiary hearing as to his claims presented herein.

Furthermore, petitioner avers that as to his overall claims presented herein, the bulk of the **Townsend** prongs apply to the particular facts and circumstances of his case, thereby rendering the state court's failure to conduct an evidentiary hearing as that of an unreasonable determination of the facts.

Finally, because petitioner's claims presented herein present mixed questions of law and fact--namely with regards to his IAC claims--and because to date, there has never been an evidentiary hearing held to resolve such mixed questions of law and fact, the presumption of correctness clause cannot safely lie in this case. See **Seidal v. Merkle, 146 F.3d (9th Cir. 1998); 28 U.S.C. § 2254 (e)(2).**

Accordingly and in sum, the state court's failure to conduct an evidentiary hearing as requested by petitioner was objectively unreasonable thereby warranting both, any contrary reasoning to be rejected, and for this court to conduct an evidentiary hearing.

CONCLUSION

For all of the foregoing reasons stated herein and those stated therein petitioner's verified declaration infra, the sought for relief formally prayed for supra should be granted at this time.

Respectfully submitted,

By: Manuel M. Navarro
Manuel M. Navarro
CDCR #P-94139 TD-6L
C.T.F. North Facility
P.O. Box 705
Soledad, Calif. 93960-0705

VERIFICATION

I, **Manuel M. Navarro**, hereby declare and affirm under penalty of perjury that all of the foregoing is true and correct, and that I am a party to this instant action, to wit, the petitioner.

Executed on this 15 day of February, 2008.

By: Manuel M. Navarro
Manuel M. Navarro
CDCR #P-94139 TD-6L
C.T.F. North Facility
P.O. Box 705
Soledad, Calif. 93960-0705

E X H I B I T "A"

MANUEL M. NAVARRO
CDCR #P-94139 TD-6L
C.T.F. NORTH FACILITY
P.O. BOX 705
SOLEDAD, CALIF. 93960-0705

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MANUEL M. NAVARRO, **Petitioner,** **-vs-** **BEN CURRY, WARDEN,** **Respondent.**	**Case No._____** **VERIFIED DECLARATION OF MANUEL M. NAVARRO, PETITIONER**

I, **Manuel M. Navarro**, hereby declare and affirm under penalty of perjury and the laws of the state of California and the United States of America as follows:

1. I am a citizen of the United States of America and a resident of the state of California currently incarcerated in a California State Prison, to wit, the Correctional Training Facility (CTF), located in Soledad, California, in the County of Monterey. I am over the age of 18 years and competent to testify as follows:

3. Since the litigation of my direct appeal in this case and all other collateral (habeas corpus) actions, I have experienced the loss of the near entirety of my record transcripts in this case--inclusive of all responding court opinions with regards to my direct appeal.

4. Specifically, due to various institutional cell searches in conjunction with my having entrusted several

fellow ("jailhouse lawyer") prisoners, the majority of my legal documents have been misplaced/lost.

5. Through inadvertence, and possibly purposely, following various random searches of my cell, a good part of my legal papers, among other personal items, have come up missing whereupon my inquiry as to their location, I have been met with fruitless results.

6. Moreover, at least one fellow prisoner of whom I entrusted to assist me with my legal endeavors, hence, entrusting him to physically possess a large portion of my legal documents, has transferred with such documents wherewhich due to my not knowing his "full name" and CDCR prison number, I am unable to locate him in that I am unaware as to the exact prison in which he transferred to.

7. I have since written to the Alameda County Superior Court in an effort to retrieve free of cost--due to my indigency--those documents of which I have lost, yet to date, I have not received a response.

8. I have also written to both the appellate and (California) supreme court in an effort to obtain all responsive opinions with regards to my direct appeal and habeas corpus litigations--all of which to date, I have not received a response.

9. I, **Manuel M. Navarro**, hereby declare and affirm on this 15 day of February, 2008, that all of the foregoing is true and correct.

Manuel M. Navarro

Manuel M. Navarro
D E C L A R A N T/Petitioner

DECLARATION OF SERVICE BY MAIL

CASE NAME: Navarro v. Curry (Habeas Corpus)

CASE NO. : U/A

I, Manuel M. Navarro, declare that I am over the age of eighteen (18) years; I am / am not a party to the attached action; I served the attached document entitled: PETITION FOR WRIT OF HABEAS CORPUS/ATTACHED DECLARATION OF MANUEL M. NAVARRO

on the persons/parties specified below by placing a true copy of said document into a sealed envelope with the appropriate postage affixed thereto and surrendering said envelope(s) to the staff of the Correctional Training Facility entrusted with the logging and mailing of inmate legal mail addressed as follows:

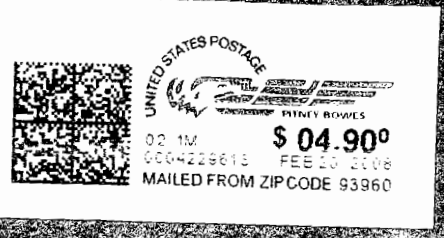
UNITED STATES DISTRICT COURT
NOERTHERN DISTRICT OF CALIFORNIA
280 SOUTH FIRST STREET, ROOM 2112
SAN JOSE, CALIF. 95113-3095

OFFICE OF THE ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA
455 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIF. 94102-7004

There is First Class mail delivery service by the United States Post Office between the place of mailing and the addresses indicated above. I declare under the penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct, and that I executed this service this 15 day of February, 2008, in Soledad, CA.

Manuel M. Navarro
Declarant

CARL A. VAUGHAN, CDCR #D-81763
C.T.F. CENTRAL FACILITY, CW-128U
P.O. BOX 689
SOLEDAD, CALIF. 93960-0689



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
280 SOUTH FIRST STREET, ROOM 2112
SAN JOSE, CALIF. 95113-3095
ATTN: CLERK OF THE COURT